

## HEARING DECISION

Petitioner:

[REDACTED]

Petitioner's Address:

[REDACTED]  
[REDACTED]

Petitioner's Parents:

[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

Tolleson Union High  
School District  
9419 W. Van Buren Street  
Tolleson, AZ 85353

Respondent's Representative:

Jennifer MacLennan, Attorney  
at Law – Gust, Rosenfeld  
201 E. Washington, Suite 800  
Phoenix, AZ 85004-2327

Petitioner's Representative:

Stephen Walker, Attorney at Law  
23245 Fairmount Blvd.  
Beachwood, OH 44122

Impartial Hearing Officer:

Harold J. Merkow  
1102 W. Glendale Ave. #116  
Phoenix, AZ 85021

Dates of Hearing:

February 27, 28, 2006 &  
March 1, 2, 3, 2006

Date of Decision:

June 2, 2006

This matter came on for hearing February 27, 28, 2006 and March 1, 2, 3, 2006 to consider the due process hearing request submitted on June 20, 2005 and supplemented on December 19, 2005. The purpose of the hearing was to consider the due process hearing request of Petitioner's parents objecting to the IEP created on October 26, 2005 which the Respondent School District has offered to Petitioner. Petitioner was represented by Stephen Walker, Attorney at Law. Respondent School District was represented by Jennifer MacLennan, Attorney at Law. The hearing was conducted as a closed hearing.

Through this due process hearing request, Petitioner's parents are seeking a decision that the Respondent School District's-offered IEP does not meet the requirements for a free, appropriate public education and that Petitioner's parents were deprived of a meaningful opportunity to participate in the IEP decision regarding Petitioner's placement.

Having heard testimony of the witnesses, having read and considered the exhibits admitted into evidence, having read and considered the parties' oral and written arguments and being fully advised in the premises, the undersigned hearing officer now makes the following findings of fact and conclusions of law and enters the following decision.

## *FINDINGS OF FACT*

1. Petitioner is a [REDACTED] year old [REDACTED] student who has attended his present private placement since 2004 when Petitioner's mother withdrew him from the former Elementary School District. To date, Petitioner continues to reside with his parents within the boundaries of the Respondent School District and, at the present time, the Respondent School District is paying the costs for Petitioner's attendance at his present private placement<sup>1</sup>.

2. Petitioner qualifies for special education services due to a [REDACTED] [REDACTED], and for [REDACTED] in the nature of [REDACTED]

3. Petitioner attended school in his former Elementary School District as a special education student. Petitioner's parents were satisfied with his education and the special education services provided to him

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<sup>1</sup>Petitioner began attending the present private placement in the [REDACTED] grade and the costs for that placement were paid by Petitioner's parents. As a result of a due process hearing request and a settlement of that request, the Respondent School District began paying the costs of Petitioner's education at the present private placement in January 2005. Respondent School District continues to pay those costs as the present private placement is Petitioner's 'stay put' placement pending the outcome of this due process hearing request.

through the [REDACTED] grade, however, when Petitioner was enrolled for the [REDACTED] grade, his IEP was changed and he received fewer special education services for his learning disability.

4. As Petitioner's [REDACTED] grade school year progressed, Petitioner's parents saw that he was not making academic progress due to his [REDACTED], he was feeling anxious about attending school since he did not feel successful in class, he gravitated towards friendships with boys who did not care much about school, he had somatic complaints to the point where he would call his mother regularly with complaints of stomach aches and, according to Petitioner's mother, Petitioner felt "defeated" and "angry".

5. While Petitioner attended [REDACTED] grade in his former Elementary School District, Petitioner's parents toured his present private placement in Scottsdale. Petitioner's parents had previously toured the school when Petitioner was in the [REDACTED] grade but, at that time, they elected to leave Petitioner in his former Elementary School District class. After touring the present private placement and having Petitioner tour the school with them, Petitioner's parents thought that the present private placement would be better for Petitioner but the former Elementary School District refused to agree to the present private placement for Petitioner's special

education needs.

6. After the end of Petitioner's [REDACTED] grade school year, Petitioner's parents withdrew him from the former Elementary School District and enrolled him in his present private placement for the [REDACTED] grade. When Petitioner was removed from his former Elementary School District placement, he was failing in his grades, he was attracted to "bad kids", he was struggling with reading, writing, math and spelling and he was in a "downward spiral" where he was doubting himself because of his failures.

7. Petitioner's present private placement has a total enrollment of [REDACTED] students from kindergarten through 12<sup>th</sup> grade and its high school enrollment totals [REDACTED] for grades 9 through 12. Most of the students have been identified with a learning disability and each student is assigned an individual counselor. Homeroom classes usually have fewer than 12 students, academic classes usually have a student to teacher ratio of 10:1 and therapy classes usually have a student to teacher ratio of approximately 6:1.

8. All students enrolled in Petitioner's present private placement are on an IEP which typically consists of six classes per day in math, social studies, science, speech and language, reading, arts, PE and a remedial

resource period. The present private placement also has a transition program for its students to either return them to their neighborhood school, attend a community college, enroll in online college classes or enter vocational training. When Petitioner was enrolled in the present private placement, there were approximately 10 children who were placed by a school district and the remainder of the students were privately enrolled.

9. In his first year at the present private placement, according to Petitioner's mother, during [REDACTED] grade, Petitioner made "tremendous" progress in reading, he got good grades and he was becoming "a real reader". Petitioner's reading class consisted of 3 students and the curriculum followed the Wilson reading program. The present private placement administrators felt that Petitioner was making progress at the end of the [REDACTED] grade, he responded to the school's structure and organization and he was more trustful.

10. Petitioner continued as a student at the present private placement for the [REDACTED] grade (2004-05 school year). According to school administrators, during the [REDACTED] grade, Petitioner made "considerable progress" in his reading, writing and math. The administrators also noticed that, when Petitioner was in a large group or when his learning

was not becoming automatic, he had a tendency to avoid his work, that when he was fatigued, his organization fell apart and that when his environment was not optimized, he did not do as well.

11. In April 2005, Petitioner's father approached the District's Special Education Director, notifying her that Petitioner was a student within the District's boundaries. Since Petitioner had been withdrawn from his former public school placement in the [REDACTED] grade, the District had not been notified about him living within the District's attendance boundaries. The Special Education Director met with Petitioner's father in June and July 2004, seeking payment from the District for Petitioner's enrollment at the present private placement.

12. The District drafted an IEP for Petitioner's [REDACTED] grade education. Petitioner's parents disagreed with the IEP and initiated a due process hearing request. As a result of the due process request, the District agreed to pay for Petitioner's placement at his present private placement for the 2004-05 school year.

13. By the end of the 2004-05 school year, Petitioner had mastered all of his IEP goals at his present private placement. The District contacted Petitioner's parents and proposed enrolling Petitioner in the District's summer reading program during the month of June 2005 in

order to begin the transition process of having Petitioner enrolled at his local home high school.

14. Because of Petitioner's parents' fears about the District declaring its summer program as Petitioner's 'stay put' in the event of disagreement about transition, Petitioner's parents declined to enroll Petitioner in the summer program and they initiated a due process hearing request.

15. Petitioner began the 2005-06 school year at his present private placement and he continued receiving special education services based on his January 2005 IEP.

16. The Respondent District set a meeting with Petitioner's parents and representatives of the present private placement in order to develop an IEP for Petitioner's attendance at the local high school. On October 26, 2005, the meeting took place at the present private placement and an IEP was created which was sent to Petitioner's parents on October 27, 2005.

17. The IEP developed at the October 26, 2005 meeting provided for specific measurable goals and objectives for Petitioner's special education needs. The IEP included a sample class list with the size of each class estimated and none of the classes included more than 17 students, except math. Three of the six classes proposed were in the resource setting in the same building on campus where Petitioner would have

adequate assistance from a teacher and aide(s). The IEP also included accommodations for Petitioner to assist him with organization, planning his time, assistance with his school work and dealing with anxiety on campus. The reading program defined in the IEP is the same reading program as the one Petitioner has been using at the current private placement (Wilson Reading Program). The IEP intended to provide special education services at the Respondent School District home high school and no consideration was given at the IEP meeting for continuing Petitioner's education at his current private placement.

18. Petitioner's parents rejected the District-proposed IEP and continued their request for a due process hearing. Petitioner's parents disagreed with the IEP insofar as they believe that the District is not offering an IEP that provides a free, appropriate public education and they contest the creation of the IEP for which their input was not sought as to the location where special education services are to be delivered.

19. An evidentiary hearing was thereafter set and the hearing occurred in February and March 2006.

20. At the evidentiary hearing, the Director of the present private placement testified that a transition plan for Petitioner to enter his local high school would require a year during which the student would be

prepared to leave the present private placement by incorporating portions of the public school curriculum, scheduling the student for classes part time at each campus, have mutual teacher observations of the student, create a "bridge" for the transition, create a written transition plan and create a safety net to prevent regression.

21. At the evidentiary hearing, the Director of the Respondent School District testified that the IEP created by the Respondent School District on October 26, 2005 contains transition planning for Petitioner including a safety net at school with counseling and support services and a contact person in the school such that Petitioner could transition to the local high school and have the October 26, 2005 IEP implemented by January 2006.

22. At the evidentiary hearing, Petitioner's mother testified that she agreed that Petitioner should be transitioned to the local high school but she further testified that the transition plan outlined by the Director of the current private placement would be required for a satisfactory placement change. She further testified that, since there is currently a lack of trust between Petitioner's parents and representatives of the Respondent School District, a level of trust must be rebuilt in order to make the transition to the local public school successful.

## *CONCLUSIONS OF LAW*

1. Petitioner is entitled to receive special education services as a student with disabilities. Petitioner is entitled to a free, appropriate public education within the least restrictive environment.

2. All due process rights to which Petitioner and his parents are entitled have been provided.

3. All notice requirements to which Petitioner and his parents are entitled have been provided by the Respondent school district.

4. The IEP developed on October 26, 2005 for the purpose of providing a transition from Petitioner's present private placement to his local high school within the Respondent School District provides all of the special education services and the delivery mechanisms to provide educational benefit for Petitioner's special education needs.

5. The IEP developed on October 26, 2005 does not adequately contain transition planning and transition services in order to provide an appropriate public education for Petitioner.

6. Because the October 26, 2005 IEP does not adequately provide transition services and planning, the October 26, 2005 does not provide

Petitioner with a free, appropriate public education in the least restrictive environment.

7. Petitioner is the prevailing party in this due process hearing.

### *HEARING OFFICER'S DECISION AND ORDERS*

It is the decision of the undersigned hearing officer that Petitioner's due process hearing request for a decision that the Respondent School District has failed to offer an appropriate Individual Educational Plan (IEP) for Petitioner's special education needs is GRANTED. Petitioner is the prevailing party in this proceeding.

Despite proceeding with the best of intentions, the Respondent School District's October 2005 IEP which seeks to repatriate Petitioner into the public school educational setting lacks fundamental safeguards to ensure that Petitioner will make progress in his IEP goals and objectives. While considerations of 'least restrictive environment' are important when developing an individualized education plan, an appropriate IEP must account for a student's social and behavioral

limitations as well as the educational deficits restricting the student's ability to make progress.

In this due process hearing request, the evidence shows that Petitioner's social and emotional limitations have not been adequately addressed in the IEP such as to impel his immediate return to a public high school. To ensure a successful transition to the public school setting, the Respondent School District, together with the current private placement, must take into account the intangibles as well as the technical considerations of providing special education services to Petitioner to show educational benefit and progress.

Equally important to a successful transition is the "safety net" that advances the goal of full-time enrollment in the public school. In light of Petitioner's disabilities, that "safety net" must include mechanisms to reduce his anxiety disorder since he will be transitioning to a school that is more than 15 times the size of his present placement, the public school setting will be novel, the class sizes will be larger and he will initially be among strangers as classmates. The flaw in the District-proposed IEP is that management of the transition to the local public high school relies too much on Petitioner's self-initiation of problem-solving in situations when he is adrift and only provides for "supportive contact person for

moments of anxiety". The weakness of the Respondent School District's proposed IEP is that it does not adequately address the possibility that Petitioner will be unable or unwilling to self-advocate. An appropriate IEP must contain a plan which allows for an extended period during which his self-advocacy skills in the public school setting would be confirmed. It is entirely plausible that, under circumstances where Petitioner does not express his anxieties or does not seek out one of the contact persons to whom he would be introduced, he will get lost in the system beginning a cascade that could replicate his experience at his former public school placement. While the Respondent School District is not required to *guarantee* Petitioner's success in the public school milieu, Respondent School District is required to anticipate scenarios, without any attenuation, which would impair Petitioner's successful transition to his home public high school.

Unquestioningly, the Respondent School District should not be penalized for the failures of the former elementary school district and the October 2005 IEP is technically sound in terms of providing special education services. The reading program mirrors Petitioner's program in his present private school placement, textbooks are comparable, the academic classes meet Petitioner's present levels of academic perfor-

mance and the remedial session is adequate to accommodate Petitioner's needs. The Respondent School District's IEP retains the foundations for Petitioner's mobility through his reading program and offers the motility to progress to higher levels of fluency, reading, comprehension and expression.

However, Petitioner's interface with a larger number of peers in a classroom, mingling with larger numbers of students on campus, interacting with new teachers, aides and support staff must have a structured transition in order to be successful and it must be a structure approximating the precision of a algorithm. Petitioner's anxiety has been medically diagnosed and is recognized as a categorically eligible disability which must be addressed beyond establishing informal relationships with staff. Indeed, because of the medical features of this diagnosis, the Respondent School District and the present private placement would be wise to include a medical practitioner among those who are monitoring and directing the transition. Furthermore, the levels of distrust between Petitioner's family and the Respondent School District must be overcome in order to ensure the success of the transition to a full public high school setting.

It is unnecessary that every transition element be included in an

IEP; it is necessary that the transition plan be structured with written milestones, all of which are geared towards full integration in the Respondent School District's home high school. Indeed, it is essential to the success of this transition that open and direct communication occurs throughout the transition process and that everyone involved is moving towards full integration in the Respondent School District's public high school.

The Respondent School District proposes a transition plan whereby Petitioner visits the home high school campus, where he meets the teachers, social worker, guidance counselor, office worker and other personnel who would be available to him, that he begins part-day programming on campus and that he alternates between the local high school and his present private placement. The undersigned believes that the Respondent School District personnel who are responsible for this transition plan are well-meaning, however, too much reliance is placed on intangible fulfillment to support the success of the transition.

The undersigned believes that the compressed transition plan proposed by the Respondent School District will not be successful if only two months are allotted before Petitioner is expected to be a full-time student in the local high school. The undersigned agrees with the present

private placement Director that a successful transition requires more coordination between schools, close communication between the two staffs, slowly increasing contact with the public school and active supervision to assure that the transition milestones are being met. Such a process may well take up to a full academic year.

Undoubtedly, Petitioner will benefit from a public school education that provides the necessary special education services and support. The beneficial effect from associating with non-disabled peers within a larger environment that is more representative of what Petitioner will face after he completes high school cannot be understated.

But, beyond prostrating to the orthodoxy of "least restrictive environment", there are salutary reasons why Petitioner should be slowly converted to the public school environment. All parties agree that Petitioner's [REDACTED] disorder is presently quiescent but a danger lurks in immersing Petitioner into classes which are significantly larger than his present classes, peril exists in expecting Petitioner to immediately trust those people to whom he is expected to go when he feels anxious, hazards are apparent if Petitioner fails to self-advocate without some system of redirection and jeopardy to the entire transition exists if Petitioner fears going to school at all.

This due process hearing is factually distinguishable from Brown v. Bartholomew Consolidated School Corp., 442 F. 3d. 588 (7<sup>th</sup> Cir. 2006) in that the age of the students is so dissimilar. The undersigned believes that transition services for a kindergartner are much simpler than providing transition services for a ● year old high school student. Irrespective of the Respondent School District's obligation to provide transition services beyond high school, there is an underlying obligation to make its special education service plan *appropriate*.

It is obvious that Petitioner's parents believe that the present private placement is nothing less than a godsend and they have a corresponding depreciated level of belief that the Respondent School District is motivated to successfully transition Petitioner into the public school setting. Since the parents' lack of trust was the catalyst in their refusal to participate in the summer reading program, the parties MUST work together to create the physical and emotional support needed for Petitioner's transition.

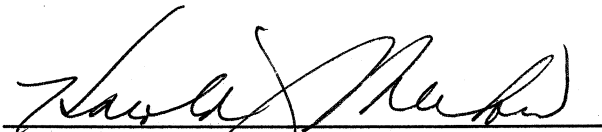
All in all, the Respondent's School District's October 2005 IEP must be recast with sufficient transition protections to address the myriad issues that require resolution. It would behoove the parties to begin that process with a summer program this year so that Petitioner can begin to

develop the flavor for a public high school campus and it would be profitable for both the Respondent School District and the present private placement to amend their IEPs to become more harmonious in directing a transition program to the public high school. Until those actions are undertaken, the October 2005 IEP does not provide for an appropriate public education and therefore, Petitioner is the prevailing party in these proceedings.

### *APPEAL RIGHTS*

THIS DECISION IS A FINAL DECISION. Any party aggrieved by this decision may file an appeal with the Arizona Department of Education, Exceptional Student Division, 1535 West Jefferson, Phoenix, Arizona, within thirty-five (35) days following your receipt of this decision.

DATED this day of 2<sup>nd</sup> day of June 2006.

  
HAROLD J. MERKOW  
Due Process Hearing Officer

Decision electronically transmitted to:

Counsel for Respondent School District  
Counsel for Petitioner

Duplicate original decisions mailed to:

Counsel for Petitioner  
Counsel for Respondent School District

Original decision filed with the Arizona  
Department of Education, Exceptional  
Student Division